

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRIS A. NEBELSIECK,)	
)	No. CV-05-0022-CI
Plaintiff,)	
)	ORDER GRANTING IN PART
v.)	PLAINTIFF'S MOTION FOR SUMMARY
)	JUDGMENT AND REMANDING FOR
JO ANNE B. BARNHART,)	ADDITIONAL PROCEEDINGS
Commissioner of Social)	PURSUANT TO SENTENCE FOUR OF
Security,)	42 U.S.C. § 405(g)
)	
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 11), submitted for disposition without oral argument on September 19, 2005. Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Stephanie R. Martz represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and remands for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

Plaintiff, a 32-year-old single man without children at the time of the administrative decision, filed applications for Social Security disability and Supplemental Security Income (SSI) benefits in October 2001, alleging onset as of February 17, 2001, due to

1 physical impairments. (Tr. at 60.) Plaintiff graduated from high
2 school and completed one semester of college. Relevant past work
3 included warehouse laborer, construction worker, home attendant, and
4 fence erector. (Tr. at 366-368.) Following a denial of benefits at
5 the initial stage and on reconsideration, a hearing was held before
6 Administrative Law Judge R. J. Payne (ALJ). The ALJ denied benefits
7 after concluding Plaintiff was unable to perform his past relevant
8 work but could perform a full range of light work. Using the Grids
9 as a framework for decision making, the ALJ concluded Plaintiff was
10 not found disabled. (Tr. at 24-25.) Review was denied by the
11 Appeals Council. This appeal followed. Jurisdiction is appropriate
12 pursuant to 42 U.S.C. § 405(g).

13 ADMINISTRATIVE DECISION

14 The ALJ concluded Plaintiff met the non-disability requirements
15 for a period of disability and was insured for benefits through
16 March 31, 2004. Plaintiff had not engaged in substantial gainful
17 activity and had severe musculoskeletal impairments and irritable
18 bowel syndrome, but those impairments were not found to meet the
19 Listings. The ALJ concluded Plaintiff's testimony was not fully
20 credible and that he retained the residual capacity to perform light
21 work with only occasional climbing, balancing, kneeling, crouching,
22 crawling or stooping. (Tr. at 24.) The ALJ found Plaintiff was not
23 able to perform his past relevant work, but could perform other
24 light work which exists in significant numbers in the national
25 economy. Thus, he concluded there was no disability.

26 ISSUES

27 The question presented is whether there was substantial
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evidence to support the ALJ's decision denying benefits and, if so, whether that decision was based on proper legal standards. Plaintiff asserts the ALJ erred when he (1) improperly rejected the opinion of the treating physicians, (2) improperly assessed Plaintiff's residual capacities and pain complaints; (3) improperly assessed Plaintiff's credibility; and (4) posed an incomplete hypothetical question to the vocational expert.

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set out the standard of review:

The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment"

1 which prevents one from engaging "in any substantial
2 gainful activity" and is expected to result in death or
3 last "for a continuous period of not less than 12 months."
4 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
5 from "anatomical, physiological, or psychological
6 abnormalities which are demonstrable by medically
7 acceptable clinical and laboratory diagnostic techniques."
8 42 U.S.C. § 423(d)(3). The Act also provides that a
9 claimant will be eligible for benefits only if his
10 impairments "are of such severity that he is not only
11 unable to do his previous work but cannot, considering his
12 age, education and work experience, engage in any other
13 kind of substantial gainful work which exists in the
14 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
15 the definition of disability consists of both medical and
16 vocational components.

17 In evaluating whether a claimant suffers from a
18 disability, an ALJ must apply a five-step sequential
19 inquiry addressing both components of the definition,
20 until a question is answered affirmatively or negatively
21 in such a way that an ultimate determination can be made.
22 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
23 claimant bears the burden of proving that [s]he is
24 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
25 1999). This requires the presentation of "complete and
26 detailed objective medical reports of h[is] condition from
27 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
28 404.1512(a)-(b), 404.1513(d)).

ANALYSIS

17 Plaintiff asserts the ALJ failed to properly reject the
18 opinions of his treating physicians, including the diagnosis of
19 sympathetic dystrophy secondary to the surgical removal of a tumor
20 in December 2001. (Tr. at 175.) Although the ALJ addressed the
21 clinical findings of the treating physicians, he relied on the
22 testimony of the consulting physician, after noting no physical
23 limitations were recommended by the treating physicians.

24 The medical expert testified Plaintiff suffered from a right
25 sensory truncal radiculopathy (T7-9) since December 2001 (also
26 referred to as sympathetic dystrophy (Tr. at 325, 329)); mid-spinal
27 thoracic sacroiliitis without involvement of the spine or
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1 spondylitis, probably present since 1993; and irritable bowel
2 syndrome. (Tr. at 20.) Relying on that testimony, the ALJ
3 concluded Plaintiff suffered from musculoskeletal problems and
4 irritable bowel syndrome. (Tr. at 21.) The ALJ noted in his
5 decision:

6 Clinic notes dated through May 14, 2003 reflect the
7 claimant developed a radicular pattern with some elements
8 of reflex sympathetic dystrophy involving the right mid
9 trunk. A history of a fused sacroiliac joint and chronic
10 low back pain was also noted with a slightly positive ANA
11 and a slightly elevated sedimentation rate. He was
continued on an increased dose of Neurontin and Minipress
and referred for rheumatology consultation to rule out
ankylosing spondylitis and evaluate his abnormal labs.
Upon rheumatology evaluation, he was diagnosed with
spondyloarthropathy.

12 (Tr. at 19.)

13 The undersigned notes that no treating or examining
14 physician has opined the claimant is totally disabled, nor
15 have they assessed any specific limitations. Further, the
undersigned notes that the claimant was not found eligible
for State medical benefits based on any disabling
condition.

16
17 (Tr. at 22.)

18 The opinion of a non-examining physician may be accepted as
19 substantial evidence if it is supported by other evidence in the
20 record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,
21 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
22 Cir. 1995). The opinion of a non-examining physician cannot by
23 itself constitute substantial evidence that justifies the rejection
24 of the opinion of either an examining physician or a treating
25 physician. *Lester*, at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502,
26 506 n.4 (9th Cir. 1990). Cases have upheld rejection of an
27 examining or treating physician based in part on the testimony of a
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1 non-examining medical advisor; but those opinions have also included
2 reasons to reject the opinions of examining and treating physicians
3 that were independent of the non-examining doctor's opinion.
4 *Lester*, at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55
5 (9th Cir. 1989) (reliance on laboratory test results, contrary
6 reports from examining physicians and testimony from claimant that
7 conflicted with treating physician's opinion); *Andrews*, 53 F.3d at
8 1043 (conflict with opinions of five non-examining mental health
9 professionals, testimony of claimant and medical reports); *Roberts*
10 *v. Shalala*, 66 F.3d 179 (9th Cir 1995) (rejection of examining
11 psychologist's functional assessment which conflicted with his own
12 written report and test results). Thus, case law requires not only
13 an opinion from the consulting physician but also substantial
14 evidence (more than a mere scintilla, but less than a
15 preponderance), independent of that opinion which supports the
16 rejection of contrary conclusions by examining or treating
17 physicians. *Andrews*, 53 F.3d at 1039. Here, aspects of the opinion
18 of the consulting medical expert are not supported by the record or
19 consistent with it.

20 Here, the diagnoses are uncontradicted and supported by
21 objective medical tests: bilateral sacroiliitis (lumbar spine x-ray
22 (Tr. at 127)); post-operative changes, including parasthesia, to
23 chest nerves, referred to as dystrophy or radiculopathy (x-ray (Tr.
24 at 177)); and spondyloarthropathy (increased sed and ANA rates, HLA-
25 B27 test positive, spasm (Tr. at 236, 291, 283)). Additionally,
26 contrary to the testimony of the medical expert (Tr. at 327-328),
27 there was objective evidence of lumbar stenosis at L4-5. (Tr. at
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261.) Irritable bowel syndrome was ruled out by tests conducted at the University of Washington medical center. (Tr. at 132.) Following Plaintiff's surgery and removal of the spinal mass, bowel problems subsided. (Tr. at 258, 281, 337.) However, Plaintiff does have an asymptomatic residual ganglioneuroma at the surgical site. (Tr. at 263.)

Although Plaintiff obtained significant relief from pain, he suffered serious side effects from immunosuppressant medications taken to control pain from his arthritic condition. (Tr. at 281, 284.) Methotrexate and Imuran were no longer available because of adverse liver effects. (Tr. at 281, 295.) Sulfasalazine did not provide relief and a prednisone taper was restarted. (Tr. at 295.) In April 2004, Plaintiff reported he had remained in bed for several days, movements were observed to be very stiff, and he was suffering from paravertebral spasm and thigh joint pain. (Tr. at 295.) By July 2004, he had limited range of motion and was taking Enbrel injections twice a week without noticeable improvement. (Tr. at 298, 317.)

On December 16, 2002, consultant Gregory Saue, M.D., limited Plaintiff to light work, noting Plaintiff had previously been limited to sedentary work when he was still in recovery from his December 2001 surgery and was unable to stand for more than four hours per day. (Tr. at 175, 208, 213.) After physical therapy, Plaintiff was reported to be much improved as to the pain in the thoracic rib area. (Tr. at 200.) There is no residual functional capacity evidence after December 2002, except for the opinion of the medical expert who did not include lumbar stenosis and resulting

1 residual limitations in his assessment. (Tr. at 252, 327.)

2 Plaintiff reported his most significant pain complaint is the
3 residual chest discomfort following his surgery. (Tr. at 338.) He
4 noted the pain will spike while he is driving or carrying anything
5 heavy such as a gallon of milk. The pain limits his ability to
6 breathe deep and there is swelling in his chest. (Tr. at 339.)
7 Plaintiff also reported it was difficult for him to sit for any
8 length of time in a straight chair or bend over. (Tr. at 339.) He
9 reported there were no side effects from medication that would
10 prevent his working. (Tr. at 341.) Plaintiff stated he lies down
11 four to five times a day for 15 to 30 minutes with a pillow under
12 his knees and a heating pad to relieve pain. (Tr. at 344.)

13 Plaintiff has challenged the ALJ's credibility findings,
14 contending his testimony should have been fully credited. In
15 deciding whether to admit a claimant's subjective symptom testimony,
16 the ALJ must engage in a two-step analysis. *Smolen v. Chater*, 80
17 F.3d 1273, 1281 (9th Cir. 1996). Under the first step, see *Cotton*
18 *v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the claimant must
19 produce objective medical evidence of underlying "impairment," and
20 must show that the impairment, or a combination of impairments,
21 "could reasonably be expected to produce pain or other symptoms."
22 *Id.* at 1281-82. If this test is satisfied, and if there is no
23 evidence of malingering, then the ALJ, under the second step, may
24 reject the claimant's testimony about severity of symptoms with
25 "specific findings stating clear and convincing reasons for doing
26 so." *Id.* at 1284. The ALJ may consider the following factors when
27 weighing the claimant's credibility: "[claimant's] reputation for

1 truthfulness, inconsistencies either in [claimant's] testimony or
2 between [his/her] testimony and [his/her] conduct, [claimant's]
3 daily activities, [his/her] work record, and testimony from
4 physicians and third parties concerning the nature, severity, and
5 effect of the symptoms of which [claimant] complains." *Light v. Soc.*
6 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's
7 credibility finding is supported by substantial evidence in the
8 record, the court may not engage in second-guessing. See *Morgan v.*
9 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If
10 a reason given by the ALJ is not supported by the evidence, the
11 ALJ's decision may be supported under a harmless error standard.
12 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990) (applying the
13 harmless error standard); *Booz v. Sec'y of Health and Human Serv.*,
14 734 F.2d 1378, 1380 (9th Cir. 1984) (same). Here, there is no
15 evidence of malingering; thus, the standard is clear and convincing
16 reasons.

17 The ALJ noted the following:

18 The undersigned has considered the claimant's subjective
19 allegations and finds that he was not entirely credible.
20 Although more limited than he has been in the past, the
21 medical evidence and the persuasive testimony of the
22 medical expert, which is afforded great weight here,
23 indicate he is capable of performing some type of work
24 activity.

25 The undersigned notes that no treating or examining
26 physician has opined the claimant is totally disabled, nor
27 have they assessed any specific limitations. Further, the
28 undersigned notes that the claimant was not found eligible
for State medical benefits based on any disabling
condition. Also, the claimant testified that he can sit
only 15 to 20 minutes when working on his computer, but
reported in a Daily Activities Questionnaire [Tr. at 90-
93] that he could do so for 1 hour at a time. On this
same form, he also reported that he could walk for 2 hours
and sit for 4 hours, before needing to rest (20 to 30
minutes). He also reported that he could lift up to 50

1 pounds occasionally, climb stairs; drive up to two hours;
2 and sleep 8 hours, without requiring rest periods often.
3 Further, in May 2002, he reported his only problem at that
point in time was sleeping, as it was difficult to remain
comfortable.

4 (Tr. at 22 (references to exhibits omitted).)

5 As to the statements of activity made by Plaintiff in the Daily
6 Activities Questionnaire, that form was signed in October 2001,
7 months before his surgery in December 2001 and resulting nerve
8 damage and the diagnosis of spondyloarthropathy in March 2004.
9 Thus, the discrepancies between his statements on the Questionnaire
10 and his testimony at the administrative hearing in February 2004 can
11 be explained by a worsening of his condition following surgery and
12 the diagnosis of spondyloarthropathy. Additionally, the record
13 remains undeveloped with respect to Plaintiff's residual capacity
14 post 2003. Thus, the ALJ's rejection of Plaintiff's testimony is
15 not supported by clear and convincing reasons supported by the
16 record.

17 Plaintiff alleged an onset date of February 2001; his date of
18 last insured is March 31, 2004. There is no evidence, based on the
19 Questionnaire and the medical record, to support a finding of
20 disability prior to October 2001. There is some question as to
21 whether disability should be found after that date, based on the
22 more developed medical record in 2003 and 2004. Thus, questions
23 remain as to whether a finding of disability is appropriate.
24 Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is
27 **GRANTED IN PART**; the matter is **REMANDED** for additional proceedings

1 pursuant to sentence four of 42 U.S.C. § 405(g).

2 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
3 **Rec. 11**) is **DENIED**.

4 3. Any application for attorney fees shall be filed by
5 separate motion.

6 4. The District Court Executive is directed to file this
7 Order and provide a copy to counsel for Plaintiff and Defendant.
8 The file shall be **CLOSED** and judgment entered for Plaintiff.

9 DATED September 28, 2005.

10
11 S/ CYNTHIA IMBROGNO
12 UNITED STATES MAGISTRATE JUDGE
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